UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MOHAWK INDUSTRIES, INC.

Employer

10–RD–209088

and

WORKERS UNITED, SOUTHERN REGION, AN AFFILIATE OF SEIU, AND ITS LOCAL 294-T

Union

And

TIA LEMON

Petitioner

_____/

UNION'S OPPOSITION TO EMPLOYER'S MOTION TO REQUEST REVIEW OF REGIONAL DIRECTOR'S DISMISSAL OF PETITION

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INTRODUCTION

Workers United, Southern Region and its Local 294-T ("Southern Region"), and their various predecessor labor organizations, have been the bargaining representative of employees of Mohawk Industries, Inc. ("Mohawk") for 79 years. Petitioner Tia Lemon filed a decertification petition (the "RD petition") supported by a showing of interest that is tainted by Mohawk's wide-spread support of the decertification effort, which includes numerous instances of Mohawk supervisors soliciting employees to sign the RD petition. Region 10 conducted a thorough investigation, and the Regional Director (the "Director") found that Mohawk unlawfully supported the decertification effort and that Mohawk's unlawful support tainted the RD petition. The Director therefore dismissed the petition. Mohawk now challenges the Director's dismissal. Notably, Mohawk does not argue that its unlawful support does not require dismissal of the RD petition under the Board's blocking charge policy and established Board law. Instead, Mohawk argues that the blocking charge policy should be overturned. However, the policy can only be changed through rule making, not on an ad-hoc basis as Mohawk has requested. Moreover, the policy is consistent with, and, in important respects mandated by, the Act's §9(c). Therefore, Southern Region respectfully requests that the Board follow its long-established blocking charge policy and affirm the Director's dismissal of the RD petition pending litigation of the Director's complaint against Mohawk for illegal support of the decertification campaign.

BACKGROUND

Relevant procedural history

Southern Region and its predecessor unions have represented a unit of Mohawk's employees since 1939. On November 1, 2017, Lemon filed the decertification petition, which was docketed as Case No. 10-RD-209088. Upon investigating the matter, Southern Region discovered numerous instances of Mohawk supervisors' direct involvement in obtaining signatures to support the RD petition. On November 7, Southern Region filed its initial charge in 10-CA-209405, along with a request to block the petition and an offer of proof. The Director granted the request to block on November 8. Nobody requested review of this decision.

On November 22, Southern Region filed an amended charge. On December 4, Mohawk filed a Request for Review of Decision to Block Petition 10-RD-209088, asserting that the Board's Rules and Regulations, §103.20, required that Southern Region file an offer of proof together with the amended charge. Around December 5, Southern Region filed an amended offer of proof. On December 13, the Director issued a second blocking letter. On December 27, Mohawk filed a Request for Review of Second Decision to Block Petition 10-RD-209088, asserting arguments similar to those made in its initial request. On February 8, 2018, the Board denied Mohawk's Requests for Review.

Meanwhile, on January 16, 2018, Southern Region filed a second charge, denominated 10-CA-212989. It later amended both charges.

After investigating the matter, the Director issued a complaint on April 30, 2018 and amendments on May 7. They alleged numerous §8(a)(1) violations.

On May 2, 2018, the Director dismissed the petition, "subject to reinstatement, if appropriate, after final disposition of the charges…." He found "evidence that the Employer assisted the decertification process" in numerous respects and that Mohawk's involvement "tainted the petition." Specifically, the Director found evidence that Mohawk assisted the decertification process by:

- soliciting employees to sign the decertification petition,
- instructing employees to solicit other employees to sign the petition,
- interrogating employees with respect to the petition,
- promising employees benefits if they signed the petition or decertified the Union,
- threatening employees with unspecified reprisals if they did not sign the decertification petition,
- creating the impression among its employees that the Employer was monitoring who had signed the decertification petition,
- allowing employees to be outside their designated work areas for the purpose of soliciting employees to sign the petition,
- transferring the Petitioner to a shift other than her own for the purpose of soliciting employees to sign the petition.

Mohawk has requested review of this dismissal order. Mohawk does not contend that the allegations, if proven, would not permanently invalidate the petition. Rather, Mohawk's brief (1) challenges generally the Board's blocking charge policy and (2) demands a hearing on whether Mohawk's unfair labor practices caused employees to support the decertification petition with their signatures.

The blocking charge policy

The blocking charge policy ("the Policy"), is set forth in the Board's Rules and Regulations, §103.20 and in the NLRB Casehandling Manual (Part Two) Representation Proceedings ("CHM"), §§11730-11731. §103.20 provides that the regional director may block the processing of a petition upon a request to block and an offer of proof. CHM §11730.3(a) identifies as an example of a charge subject to this procedure "an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the support of a RD … petition…." CHM §11733.2(a)(1), entitled "Violations that Affect the Petition or Showing of Interest," provides that the Regional Director should dismiss the petition if the §8(a)(1) charge is meritorious "and the alleged conduct, if proven, directly affects a petition or its showing of interest to an extent that the showing is insufficient…." The dismissed charge will be "subject to a request for reinstatement by the petitioner after final disposition of the C case." See also CHM §11733.2(b), providing guidance as to the dismissal letter's contents.

ARGUMENT

I. Introduction to the argument

Mohawk challenges the very existence of a blocking charge policy. Mohawk wants the Board to eliminate the Policy and to replace it with a new policy of vote now, impound the ballots, litigate later any charges of unlawful employer support.[1] However, because the Policy is codified in Board's Rules and Regulations, §103.20,

[1] Mohawk's Motion to Request Review and Brief in Support of Request for Review of Decision to Dismiss Petition 10-RD-209088 ("Mohawk's Request"), p.18.

to eliminate the Policy the Board must invoke APA rulemaking. Moreover, there is ample evidence of Mohawk's unlawful support of the decertification effort. Under the blocking charge policy and established Board case law, the RD petition is tainted and must be dismissed.

Even though a request for review is not the appropriate forum to change the Board's blocking charge policy, Southern Region explains why the policy should be maintained. The Policy is set forth in the CHM. The CHM's purpose is to provide guidance for the Board's regional personnel.[2] The CHM provisions regarding the Policy provide guidance for the effectuation of §9(c)(1)(A) requirements (1) that decertification petitions be filed with significant employee support, where "significant" implies support untainted by employer interference, restraint and/or coercion; and (2) that employers not indirectly file decertification petitions by unlawfully supporting a nominal employee petitioner. Determining whether a petition complies with these §9(c)(1)(A) requirements is a prerequisite to processing the petition – if there is non-compliance, there is no hearing and no election. Moreover, processing non-compliant petitions would allow employers to scam the Board's §9 election processes and would waste the Board's resources on elections that would likely be declared invalid. And a vote conducted before the Board determines whether the employer unlawfully supported the petition would undermine pro-union employees' §7 rights to union representation while providing little to those opposing the union.

[2] E.g., CHM (Part Two) Representation Proceedings, introductory section entitled "Purpose of the Manual."

The Policy does not disparately treat RD and RC petitioners. It similarly treats charges of unlawful support of both RD and RC petitions. And, the resolution of blocking charges is similar to the resolution of other matters that are routinely determined before an election is conducted in both RD and RC proceedings.

Mohawk also complains that there was no determination that the alleged violations caused the employees to sign to support the anti-union petition. The Director, however, cited *SFO Good-Nite Inn*,[3] which held that causation here is conclusively presumed. Moreover, the case against Mohawk is so strong that causation would be found whether it was conclusively presumed, rebuttably presumed or subject to some any other analysis. And, whatever analysis is appropriate, causation should not be subject to a hearing. Any hearing would reveal the identities of the signatories, thereby infringing on their §7 rights to keep secret their anti-union activity.

This brief focuses on the Policy as it affects the dismissal of a decertification petition because of employer support. The Policy affects other violations in different ways, including violations which do not affect a petition's validity ("Type 1 violations"), and violations which might taint a petition but do not involve employer support, e.g. bargaining violations or unlawful discharges that might cause employee disaffection. These matters are not at issue here and will not be addressed.

[3] 357 NLRB 79 (2011), enfd. 700 F.3d 1 (D.C. Cir. 2012).

The Policy also implicates the Director's preliminary decisions to block the instant petition. Mohawk has previously and unsuccessfully requested review of these decisions. Mohawk cannot revive these matters now.[4]

Circumstances surrounding proposed settlement agreements are similarly not at issue here and will not be addressed.

II. Because Board's Rules and Regulations, §103.20 codified the Policy, the Board may eliminate the Policy only through APA rulemaking

Mohawk's brief challenges very existence of a blocking charge policy, Effectively it challenges the Board's Rules and Regulations, §103.20. However, a request for review is not the appropriate forum to challenge the Policy; instead Mohawk must raise this challenge through a petition for rulemaking. It may not ask the Board to nullify its published regulation casually through ad hoc decision-making.

§103.20 includes the language:

> If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate.

In other words, if the party's offer of proof describes evidence that, if proven, would interfere with employee free choice or would be inherently inconsistent with the petition itself, §103.20 "would require that the processing of the petition be held in abeyance absent special circumstances…."

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[4] Mohawk renews its complaints in Mohawk's Request, p.9-12.

In the promulgating the 2014 election rules,[5] of which §103.20 was a part, the Board wrote, and the dissent agreed, that §103.20 codified the Policy. The Board wrote that it "has decided to codify certain revisions to that [blocking charge] policy here in §103.20."[6] And the dissent wrote, "we … oppose having the blocking charge policy codified in the Board's formal Rules."[7]

The Board promulgated the Policy under authority granted by the Act's §6. §6 authorizes the Board "to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act ("APA")] … such rules and regulations as may be necessary to carry out the provisions of this subchapter." Because §103.20 is a rule made by the Board in accordance with the APA, it may not be rescinded except "in the manner prescribed by" the APA, i.e. through notice and comment. See *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, holding that an agency may not suspend its regulations without subjecting this change to APA notice and comment requirements.[8]

Even before promulgating §103.20, the Board indicated that Policy changes are more amenable to rule-making than to review of a regional director's decision. In *Wellington Industries*, the Board declined to reconsider the Policy "in the context of

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[5] 79 Fed.Reg.74308 (2014)

[6] *Id.*, 74419. See also, *id.*, 74429 ("In our view, if codification means that any future change in the policy would involve notice and comment rulemaking, so much the better."), and *id.* ("We see no reason to forebear codifying a policy applied so consistently and for such a rational purpose.").

[7] *Id.*, 74456. See also *id.,* 74455 ("In the Final Rule … the blocking charge policy is being retained … and it is being embedded in the Final Rule itself.) and *id.*, 74456 ("codifying the policy is likely to impede or preclude further changes or improvements in this important area").

[8] 716 F.2d 915, 920 (D.C. Cir. 1983).

this request for review," noting that "the subject would be better addressed as part of the current rulemaking concerning Board representation case procedures, in which the Board specifically invited comments on whether it should change its blocking charge policy."[9] The Board noted that "rulemaking presents a more suitable vehicle for revisiting our procedures in this arena in a fully informed and comprehensive manner."[10]

In short, the Board's blocking charge policy cannot be overturned through this request for review. Instead, any changes to the Policy must be made through the rulemaking process.[11] For this reason alone Mohawk's request for review should be denied, because, assuming the truth of the §8(a)(1) allegations, Mohawk does not contend that the RD petition's dismissal is unwarranted under current Board policy.

III. The rampant evidence of Mohawk's direct support of the decertification effort requires dismissal of the RD petition under established Board precedent

As a result of the Employer's direct involvement in the decertification effort, the Director correctly found that the showing of interest submitted in support of the RD

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[9] 359 NLRB 246 (2012),

[10] *Id.*

[11] Even if the blocking charge policy is changed at some future date through rulemaking, the change will have no effect on the dismissal of the instant RD petition, because any change made through rulemaking would apply only prospectively. *Letter from NLRB Chairman Ring to Senators Warren, Sanders and Gillibrand*, https://www.nlrb.gov/sites/default/files/attachments/news-story/node-6695/nlrb_chairman_provides_response_to_senators_regarding_joint_employer_inquiry.pdf, at p. 2, dated June 5, 2018 ("final rules issued through notice-and-comment rulemaking are required by law to apply prospectively only.")

petition is tainted and rightly dismissed the petition. The Director's decision was consistent with well-established Board precedent. *SFO Good-Nite Inn, LLC*,[12] *Canter's Fairfax Restaurant, Inc.*[13]

A. Supervisors directly solicited employees

There is ample evidence of Mohawk's direct involvement in the decertification effort by soliciting signatures: The evidence shows that throughout October, 2017, Area Manager Victoria Petty frequently visited employees during working hours, in departments outside her normal jurisdiction, to solicit signatures on the petition. She made multiple attempts to sign employees who refused, instructed employees to report to her office for the purpose of coercing their signatures, and aggressively solicited employees to assist with getting co-workers to sign the petition.

In addition, the evidence shows that Human Resources Manager Megan Hall and Communications Specialist Joe Barragan (a Mohawk agent) witnessed solicitation by anti-union employees, and immediately followed-up to continue the persuasion when employees refused to sign. Barragan strongly encouraged an employee to sign in his office.

The solicitation of decertification petition signatures by supervisors is the quintessential example of direct employer involvement and it is well-established that a RD petition should be dismissed when such direct involvement is found.

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[12] 357 NLRB 79 (2011) (employer assistance or advancement of decertification effort presumptively taints a resulting petition), enfd. 700 F.3d 1 (D.C. Cir. 2012).

[13] 309 NLRB 883, 884 (1992) (explaining that the Regional Director has authority to dismiss an RD petition following an investigation that "reveal[s] that the showing of interest was in fact tainted by the Employer's direct involvement in the decertification effort.")

Hearst Corp.,[14] *V&S Pro Galv, Inc.*,[15] *American Linen Supply Co.*,[16]; *Texaco, Inc.*,[17] *Crafttool Mfg. Co.*[18]

B. Mohawk coerced employees to sign the petition.

In addition to the personal solicitation of signatures by supervisors, the other evidence presented demonstrates that the Employer provided unlawful assistance to the decertification campaign. For example, the evidence shows that Human Resources Manager Megan Hall personally interrogated employees as to whether they would sign the petition and created the impression that Mohawk was monitoring who signed the petition by telling employees "they need just a couple more signatures" on the decertification petition. Also, on multiple occasions, Area Manager Victoria Petty interrogated employees as to whether they would sign the decertification petition, promised benefits to employees if they signed the decertification petition, and threatened employees with unspecified reprisals for not signing the petition. Specifically, Petty, after calling an employee into her office and coercing him to sign the petition, instructed him to solicit signatures from specific

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[14] 281 NLRB 764, 764 (1986) (where employer seeks to solicit employee repudiation of union as representative, decertification petition is tainted and employer "will be precluded from relying on [it] as a basis for questioning the union's continued majority support"), enfd. mem. 837 F.3d 1088 (5th Cir. 1988).

[15] 323 NLRB 801, 808 (1997) (employer's president tainted petition by soliciting employees to sign), enfd. 168 F.3d 270 (6th Cir. 1999).

[16] 297 NLRB 137, 137-138 (1989) (employer tainted petition by unlawfully soliciting an employee to sign), enfd. 945 F.2d 1428 (8th Cir. 1991).

[17] 264 NLRB 1132, 1132-1133 (1982) (employer's explicit instructions to employees on procedures for decertifying, including dictating language of petition, typing petition, and granting employee afternoon off to distribute it, as well as supervisory involvement in collecting signatures, tainted petition), enfd. 722 F.2d 1226 (5th Cir. 1984).

[18] 229 NLRB 634, 636-638 (1977) (employer's participation in circulation of antiunion petitions tainted its withdrawal of recognition).

employees in their designated work areas. Petty not only made multiple attempts to solicit and coerce signatures from three employees who worked closely together, but pressured them by stating that if one signed, they all would sign.

This unlawful assistance also requires dismissal of the RD petition. An employer violates Section 8(a)(1) of the Act by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative." *Wire Products Mfg. Co.*[19] In determining whether an employer's assistance is unlawful, the appropriate inquiry is "whether the Respondent's conduct constitutes more than ministerial aid." *Times Herald*.[20] It is unlawful for an employer agent to interrogate employees about whether they have signed a decertification petition, promise benefits for signing a petition, and threatening employees for not signing a petition. The evidence shows that Mohawk repeatedly engaged in all of these unlawful activities. As a result, the RD petition must be dismissed. *See e.g. NLRB v. Proler International Corporation*.[21]

C. Mohawk encouraged and facilitated employee solicitation.

Here, Mohawk was directly involved in the decertification process. The evidence shows that Area Manager Victoria Petty personally directed an employee

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[19] 326 NLRB 625, 640 (1998), enfd.sub nom. mem. *NLRB v R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000)

[20] 253 NLRB 524 (1980).

[21] 635 F.2d 351, 354 (5th Cir. 1981) ("[s]ection 8(a)(1) of the Act makes it unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union repudiating document, particularly where the solicitation is strengthened by the express or implied threats of reprisal or promises of benefit.")

to solicit other employees to sign the decertification petition. Moreover, Mohawk allowed petition circulators to collect signatures on work time and transferred Lemon to the 3rd shift to collect additional signatures. This unlawful conduct also requires dismissal of the RD petition. See *Consolidated Blenders*, dismissing a decertification petition where "the plant superintendent permitted the decertification petition to be circulated on company time and property…."[22] And see *Highland Yarn Mills*, finding that the employer violated §8(a)(5) by withdrawing recognition from the union on the basis of a petition tainted by the employer's giving anti-union employees free rein of the plant to solicit signatures.[23] Mohawk thus committed multiple unfair labor practices directly tied to the decertification process and has provided more than ministerial aid in advance of the petition efforts. Therefore, the Employer by its conduct has tainted the RD petition, and the Director correctly so found.

D. The Director fairly investigated the alleged unfair labor practices

Mohawk challenges the quality of the Director's investigation.[24] During this investigation, regional personnel interviewed approximately 19 witnesses produced by Southern Region. A number of these witnesses were not union members. They testified to a consistent pattern of Mohawk's support, if not direction, of the

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[22] 118 NLRB 545, 547 (1957).

[23] 313 NLRB 193, 208-209 (1993).

[24] Mohawk's Request, e.g. p.4 ("Region 10 blithely accepted the claims that the Employer-one with an untarnished record-generated and supported the Petition, and ultimately dismissed it based on accusations made by interested parties.

decertification campaign. A review of the administrative file would show that each allegation in the Director's dismissal letter is adequately supported.

Bizarrely, Mohawk presents the Director's rejection of important Union charges as somehow impugning the investigation's quality.[25] Specifically, the Director found no merit in charges that Mohawk instigated the petition and made plant-closing threats. But the Director's rejection of these charges reflects only favorably on the investigation's quality. It shows that the Director did not accept at face value Southern Region's evidence and that he gave serious consideration to Mohawk's evidence and argument.

Similarly, regarding the meritorious charges, the Director impartially weighed Mohawk's evidence against Southern Region's evidence. But, regarding these charges, he found that the evidence supported Southern Region.

Whatever errors the Region made will be fully aired before the administrative law judge. Meanwhile, the investigation's results strongly support the Director's decision to dismiss the petition.[26]

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[25] Mohawk's Request, p.15-18.

[26] Mohawk references comments made by Union Special Projects Coordinator Phil Cohen on a radio broadcast to allege that the Union manipulated the NLRB to dismiss the RD petition. Mohawk's Request, p.17-18. To the extent that this allegation requires a response, it is demonstrably untrue, as the evidence clearly shows that Region 10 conducted an independent investigation of the charges filed by all parties and found rampant instances of direct support of the decertification campaign by employer agents, as well as multiple instances of employee coercion by Mohawk supervisors.

IV. Mohawk is not entitled to a pre-dismissal hearing, only to an administrative investigation.

As stated above, the instant request for review is not the proper forum for a challenging to the Board's blocking charge policy. Nevertheless, the Union will address Mohawk's arguments regarding the merits of the Policy, and why the Policy is consistent with the Act and should not be overturned.

Mohawk complains that the Regional Director dismissed Lemon's RD petition without providing a hearing. However, §9, and the CHM provisions implementing §9(c)(1)(A), indicate that the Director may dismiss an RD petition if the Director finds that the petition does not meet the prerequisites for its processing. These prerequisites include that the petition must have substantial employee support and that the petition must be filed by a person authorized by §9(c)(1)(A) to file a petition. Here, the petition lacked substantial employee support because Mohawk's unlawful assistance tainted that support. And, also because of Mohawk's unlawful assistance, the petition was indirectly filed by an employer, a person not among those authorized by §9(c)(1)(A) to file an RD petition.

While Mohawk suggests that the Director conduct an election and impound the ballots pending the results of a post-election hearing, this procedure would be contrary to §9(c)(1)(A)'s policy of only processing petitions that meet the statutory prerequisites and would undermine employees' §7 rights to representation by their Union. The conduct of a tainted election is itself coercive. And the election would provide anti-union employees with an uncertain election outcome and no real

benefit – the employer must continue to bargain with the union while the matter is litigated.

A. §9(c)(1)(A) indicates that employer-supported RD petitions should be dismissed on the basis of an administrative investigation.

1. §9(c)(1)(A) and Policy provisions implementing §9(c)(1)(A) require that a decertification petition be filed with a substantial showing of employee support, which excludes support obtained through employer unfair labor practices.

§9(c)(1)(A) requires that decertification petitions be supported by a "a substantial number of employees…." Any "substantial number of employees" must exclude employees whose signatures were obtained unlawfully through employer interference, restraint or coercion in violation of §8(a)(1) or §8(a)(2), or through union restraint or coercion in violation of §8(b)(1(A). See, *Dejana Industries*,[27] *Airgas*,[28] and *Coca Cola Bottling Co.*,[29] all dismissing petitions tainted by unlawful employer and/or supervisory support. The Policy, as expressed in CHM §11730.3(a), implements §9(c)(1)(A) by recognizing that such charges may "challenge the circumstances surrounding … the showing of interest" and, "[i]f meritorious … may invalidate … some or all of the showing of interest. As a consequence, the petition may be dismissed."

2. §9(c)(1)(A) and Policy provisions implementing §9(c)(1)(A) require that employers not file

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[27] 336 NLRB 1202 (2001).

[28] 5-RD-1445, 2008 NLRB Reg. Dir. Dec. LEXIS 232 (Regional Director, October 8, 2008)

[29] 31-RD-1564, 2007 NLRB Reg. Dir. Dec. LEXIS 314 (Regional Director, November 9, 2007).

decertification petitions indirectly by unlawfully assisting employees in the petitioning process

§9(c)(1)(A) also provides that decertification petitions may only be filed "by an employee or group of employees or any individual or labor organization…." Employers are not on the list of persons eligible to file decertification petitions.

In fact, a separate provision of §9(c)(1), §9(c)(1)(B), provides that an employer may file a petition – an RM petition – "alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the [§9(a)] representative…." Where a union currently represents the employer's employees, the employer must also show, by objective considerations, that the employer has a reasonable good faith uncertainty as to the union's continuing majority status in the represented unit.[30]

Employers may not circumvent the requirements for filing RM petitions – which requirements are frequently difficult for employers to meet – by unlawfully assisting petitioning employees in soliciting support for a decertification petition, for which "substantial" support generally means only 30% of unit employees. In a number of cases, the Board has dismissed petitions filed "indirectly" by employers, i.e. where an employee filed a decertification petition that the employer "fostered." E.g., in *Bond Stores*, the Board dismissed a decertification where the employer's lawyer advised employees about decertifying the union and the employer permitted the employer's typist – on company time – to assist the employees. The Board reasoned that §9(c)(1(A) "indicates that decertification proceedings provide a

[30] *Levitz Furniture Co.*, 333 NLRB 717, 727 (2001).

remedy exclusively for and on behalf of employees, and not employers" and that "the Board cannot, as a matter of policy, permit an employer to do indirectly, through instigating and fostering a decertification petition, that which we would not permit him to do directly."[31] See also *Gold Bond*, dismissing a petition where the employer "indirectly" filed petition through unlawful support of the decertification effort.;[32]

The Policy, as expressed in CHM §11730.3(a), also implements §9(c)(1)(A) by recognizing that charges alleging unlawful employer support may "challenge the circumstances surrounding the petition" and, "[i]f meritorious … may invalidate the petition…. As a consequence, the petition may be dismissed."

3. In accordance with both §9(c)(1)(A) and its implementing Policy, no hearing may be held, and no election may be conducted because Lemon's petition did not meet §9(c)(1)(A)'s prerequisites; specifically, because of Mohawk's unlawful support, the petition (a) lacked substantial employee support and (b) was indirectly filed by Mohawk.

The Director found that there is a significant likelihood that Lemon's showing of interest and/or petition is invalid. To conduct an election before resolving the validity questions in unfair labor practice proceedings would run counter to §9(c)(1)(A)'s language and intent, that the petitioner satisfy §9(c)(1)(A)'s prerequisites so as to avoid the Board's expenditure of resources on an election that will likely be deemed invalid. Therefore the Director dismissed Lemon's petition in accordance with both §9(c)(1)(A) and the implementing Policy.

§9(c)(1) reads in relevant part:

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[31] 116 NLRB 1929, 1930 (1956).

[32] 107 NLRB 1059, 1060 (1954)

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees … assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer … [the §9(a)] representative …
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> ***
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. *** If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

The above language establishes a series of prerequisites that must be met before the Board holds a hearing and before the Board conducts an election. The procedure starts "[w]henever a petition shall have been filed…." That petition must have "substantial" employee support. It must be filed by a specified person who is not an employer. Only upon the filing of such a petition satisfying these prerequisites does the Board start investigating the petition. Only after that investigation gives the Board "reasonable cause to believe that a" representation question exists is an appropriate hearing required. And only if the hearing record establishes that a representation question exists shall the Board direct an election. In short, unless there is a petition that (a) employees substantially support and (b) an appropriate person has filed, there should be no hearing and no election.

Indeed, the substantial support requirement's purpose is to avoid expending resources on unnecessary elections[33] - and even on unnecessary pre-election investigations and hearings. In *NLRB v. Metro-Truck Body, Inc.*, the court stated, "Were the NLRB unable to require a substantial interest on the part of the target company's employees before commencing an investigation, it would be forced to investigate every representation petition filed by a union, regardless of the actual chances of that petition's success."[34] So, "there is no purpose in permitting the parties to litigate the adequacy of a union showing of substantial interest."[35]

Here, as set forth in the Director's dismissal letter, the Director – after his administrative investigation but without a hearing – determined that Mohawk unlawfully supported "the decertification effort and tainted the petition." Further expenditure of agency resources on an election, which will likely be deemed invalid, will likely waste the agency's resources. As the Director wrote, "further proceedings on the petition are unwarranted." And further, the issue can be revisited after "final disposition" of the unlawful support charges. In short, the Director followed §9(c)(1)(A), as well as the Policy that implemented the statute, more specifically CHM §§11730.3(a), 11733.2(a)(1), and 11733.2(b).

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[33] Outline Of Law And Procedure In Representation Cases (2017), Chapter 5, p.49, and cases cited therein.

[34] 613 F.2d 746, 749-50 (9th Cir. 1979).

[35] *Id.*

4. The Policy prevents employer abuse of §9, thereby protecting employee §7 rights.

The conduct of elections based on petitions filed with unlawful employer support is "a direct abuse of the Board's electoral process itself." *Ron Tirapelli Ford, Inc. v. NLRB.*[36] Such elections would "allow the employer to profit by his own wrongdoing." *Bishop v. NLRB.*[37] And when employers profit by unlawfully getting rid of the union, employees are deprived of their §7 rights to union representation.

5. Recent pro-petitioner precedent supports the dismissal of RD petitions determined administratively to be employer-supported

The Policy and the above interpretation of §9(c)(1)(A) gained support from *Truserv Corp.* In *Truserv,* a decision particularly solicitous of decertification petitioners' rights – the Board ordered the reinstatement of a decertification petition after unfair labor practices that could have tainted the petition under *Master Slack*[38] had been settled and remediated – the Board noted that "a decertification petition may not be processed [post-settlement], if … *the Regional Director finds* that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the

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[36] 987 F.2d 433, 443 (7th Cir. 1993). Although *Tirapelli Ford* involved a post-election challenge to an RM petition, its rationale applies with even more strength to pre-election challenges to RD petitions. The court noted that "Typically, the objections to the unfair labor practices leading to the decertification petition are filed during the pre-election period, and the Board's finding of impermissible employer involvement results in a canceled election." And further, "a petition ought to be held invalid, even in the comparatively rare case, such as this one, where the election occurs before the discovery of the illegality," i.e. petitions also ought to be held invalid, and therefore dismissed without an election, in the typical case where the union discovers the illegality before any election.

[37] 502 F.2d 1024, 1029 (5th Cir. 1974). The harm inflicted by a tainted election, even if later overturned, is discussed below in section IV.B.

[38] See discussion below concerning *Master Slack* in section V.

employer…." [emphasis added].[39] The Board cited favorably[40] *Canter's Fairfax Restaurant.*[41]

Canter's involved unfair labor practices settled post-complaint. The Board rejected the union's objection that the settlement failed to provide for dismissal of a decertification petition that the employer allegedly unlawfully supported. "Nothing in the instant settlement precludes the Regional Director from hereafter conducting an investigation in the representation case of the petition's showing of interest, or from dismissing the petition should that investigation reveal that the showing of interest was in fact tainted by the Employer's direct involvement in the decertification effort."[42]

B. Vote and impound compromises employees' §7 rights and does not advance the §7 rights of anti-union employees

1. Conducting an election in an atmosphere tainted by employer unfair labor practices is itself coercive.

An election conducted in an atmosphere tainted by employer unfair labor practices will reinforce anti-union attitudes formed during the coercive campaign to solicit signatures for the election petition. The election would leave employees further entrenched in their anti-union position by the time they get to vote in a post-remediation election.

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[39] 349 NLRB 227, 227 (2007).
[40] *Id.*, 231.
[41] 309 NLRB 883, 884 (1992).
[42] *Id.* [footnote omitted].

In promulgating the 2014 election rules, the Board favorably cited the AFL-CIO's argument that "the tainted election will [likely] compound the effects of the unfair labor practices: an employee who voted against union representation under the influence of the employer's unlawful conduct is unlikely to reconsider the issue and change his or her vote in the rerun election."[43] The Board analogized *NLRB v. Savair Mfg. Co.* in which the Supreme Court held that a union violated the Act by promising employees that it would waive initiation fees for employees who sign recognition slips before the Board conduct an election. The Court recognized that, "while it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union."[44]

In promulgating the 2014 rules, the Board also cited cognitive dissonance theory as suggesting that employees, once unlawfully committed to an anti-union position, will have difficulty abandoning that position. "[W]hen a person is forced to do something she may not support, ultimately, researchers have found that her attitude towards that issue becomes more positive than it otherwise would have been."[45]

So employees, who sign to support a tainted decertification petition, thereby committing themselves to an anti-union stance, are likely to vote against the union

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[43] 79 Fed. Reg. at 74418.

[44] 414 U.S. 270, 277–78 (1973).

[45] 79 Fed. Reg. at 74418 and *id.*, fn.482.

in an election held before the employer remediates the unlawful support charges. And, employees who vote against the union in the tainted election are more likely to vote against the union in a post-remediation election.

2. The uncertainty created by an election with impounded ballots would undermine the employees' right to union representation pending final disposition of the charges and the petition.

A quick election with impounded ballots would not determine the rights of those employees who want to get rid of the union. The litigation of allegations of unlawful employee support will continue for months if not years. The anti-union employees will have to wait for the litigation to take its course before a final ruling that they are free of the union – or not.

Meanwhile, this uncertainty would adversely affect the union supporters who want to assert their §7 rights to union representation, which often (although not in this case) would mean that imminently they will want their union to negotiate a successor contract. See *W.A. Krueger Co.*, holding that employees remain represented by their union pending resolution of objections to a decertification election.[46] These employees' ability to assert their rights – their bargaining strength – will be diminished if their fellow employees and the employer believe that the impounded ballots, as soon as they are opened, would demonstrate that the union lost majority support.

The infringement of these bargaining rights would last for a long time. Months pass while the parties litigate their case before a hearing officer in post-election

[46] 299 NLRB 914, 916-917 (1990).

hearings and then request review of the hearing officer's decision. The delay is even longer when taint allegations are consolidated with unfair labor practice proceedings, which are decided by an administrative law judge and subject to appeal to the Board and to an appeals court. No wonder that in commenting on the 2014 election rules, the Board favorably cited the SEIU's argument that inconclusive elections "drill[] into the unit employees' minds the lesson that engaging in the election process is futile."[47]

3. Even if the decertification petitioner ultimately prevails, a vote taken at the time petitioner prevails would better reflect employee desires than a vote taken pre-litigation.

If the decertification petitioner ultimately prevails, the votes cast pre-litigation would be stale. They were cast months if not years before by employees some number of whom have since changed employment or changed their minds. Numerous appellate court decisions, usually when considering the propriety of a *Gissel* bargaining order, find that changed conditions after the passage of time may justify a new election rather than reliance on older evidence of employee union support.[48]

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[47] 79 Fed. Reg. at 74419.

[48] E.g., *Avecor, Inc. v. NLRB*, 931 F.2d 924, 937 (D.C. Cir. 1991) (in deciding whether to issue Gissel order, Board usually must consider employee turnover); *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280, 284 (6th Cir. 1981) (four-year passage of time since first election militates in favor of a rerun election and against a bargaining order); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 120 (1st Cir. 1978) (termination of management employee who committed unfair labor practices reduced likelihood that past practices would affect future employee choice).

V. The Policy does not discriminate between RD and RC petitions.

Mohawk claims that the Policy discriminates against RD petitions while favoring RC petitions.[49] It does not.

A. The Policy applies equally to all illegally supported petitions

The Policy applies equally to employer support of both RD and RC petitions. Assuming that the Policy in this regard disparately affects RD and RC petitions, it likely does so because employers much more frequently support anti-union organizing than pro-union organizing. But see *Dejana Industries*,[50] and *National Gypsum Co.*,[51] both dismissing RC petitions because supervisors solicited signatures.

The Policy also applies equally to both unlawful employer support of petitions, including RD petitions, and to unlawful union support of petitions, including RC petitions. See CHM §11730.3(a), which explicitly applies the Policy to "8(b)(1)(A) charge[s] that allege[] a labor organization's showing of interest was obtained through threats or force." Assuming that the Policy in this regard disparately affects unions and employers – and/or RD and RC petitions – it likely does so because the law generally permits unions to support petitions, except for coercive support, e.g. threats and bribes; and generally prohibits employers from supporting petitions, apart from ministerial conduct and §8(c)-protected speech.

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[49] Mohawk's Request, p.1-2.

[50] 336 NLRB 1202 (2001).

[51] 215 NLRB 74 (1974).

These disparities are in no way unfair but are built into the Act's structure. The Act's §8(a)(1) prohibits employer interference, restraint and coercion. But this section's counterpart, §8(b)(1)(A) prohibits only union restraint and coercion. And the Act's §9(c)(1)(A) provides for election petitions filed by unions "alleging that a substantial number of employees … wish to be represented for collective bargaining," implying a union's right to solicit evidence of employee support. But §9(c)(1)(A) provides for no pro or anti-union petitions to be filed by employers, and §9(c)(1)(B) provides for employer petitions supported by no similar showing of interest, implying that employer solicitation to support RD petitions is unlawful and that the resulting petitions are invalid.[52]

B. Blocking charges are similar to other matters that must be determined before either an RC or RD election is conducted because the resolution of such matters would determine whether the Board could conduct a valid election

Mohawk also accuses the Board of implementing a discriminatory policy such that, for RC petitions, all litigation is deferred until after the election while, for RD petitions, blocking charges delay any election until the charges' resolution.[53] In fact the 2014 election rules defer resolution of one category of matters while continuing the Board's practice of resolving many other matters pre-election. Moreover, blocking charges – unlike the matters deferred for post-election resolution by the new rules – would likely invalidate any election conducted before their resolution.

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[52] Above, section IV.A.

[53] See, e.g. Mohawk's Request, p.1-2.

The 2014 election rules "ordinarily" delay for post-election resolution only one new category of issues – "individual eligibility or inclusion issues that do not significantly change the size or character of the unit…."[54] The rules continue the historic practice of resolving pre-election numerous issues, including, "(1) jurisdiction; (2) labor organization status; (3) bars to elections; (4) appropriate unit; (5) multi-facility and multi-employer issues; (6) expanding and contracting unit issues; (7) employee status of a significant portion of the unit; (8) seasonal employees; (9) inclusion of professional employees or guards with other employees in a unit; (10) eligibility formulas; and (11) craft and health-care employees"; [55]and eligibility or inclusion issues that would "significantly change the size or character of the unit…."[56]

Blocking charges – which of course may be filed in either RD or RC proceedings – are similar to a number of those issues that must be resolved before an election is conducted, e.g. jurisdiction, labor organization, election bars – and distinguishable from matters newly deferred for post-election resolution – because the resolution of blocking charges may mean that no valid election could be conducted. If the blocking charges are sustained, usually no new election may be conducted, at least until after the violation is remediated, and, in the case of charges that taint a petition, until a new, untainted petition is filed. And especially regarding blocking

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[54] "Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015," GC 15-06 (April 6, 2015), p.12.
[55] *Id.*, p.13-18.
[56] *Id.*, p.12-13.

charges that taint a petition – the type of charges at issue here – the Board should not conduct an election that will result in "the needless expenditure of Government time, efforts, and funds."[57] On the other hand, regarding those matters that should be resolved post-election under the 2014 election rules, there would be no question that an election would have to be conducted; the only question would be whether a relatively small number of ballots should be counted.

VI. The Director correctly determined that Mohawk's unlawful assistance to the decertification effort tainted Lemon's petition

The Director determined that Mohawk's unlawful assistance to the decertification effort caused employees to provide their signatures to support the RD petition. The Director implied this causation determination by citing *SFO Good-Nite*. The Director properly conducted no *St. Gobain* hearing because §9(c)(1)(A) provides for no further proceedings on an RD petition once the regional director determines that the petition lacks substantial employee support and/or the petition was filed by an employer. Any such hearing would unnecessarily compromise the identities of the employees who signed on to the showing of interest.

A. The Director properly based his causation determination on *SFO Good-Nite's* conclusive presumption that unlawful employer support tainted the petition.

SFO Good-Nite, in which the employer violated §8(a)(5) by withdrawing recognition from the union on the basis of a disaffection petition that the employer

[57] Outline of Law and Procedure in Representation Cases (2017), chapter 5, p.49, and cases cited thereafter.

"instigated" and/or "propelled,"[58] applied a conclusive presumption that unlawful employer support caused the tainted petition.[59] *SFO Good-Nite* remains as governing precedent.

The Director properly omitted any *Master Slack* analysis,[60] the causation analysis prescribed by *St. Gobain Abrasives*.[61] *SFO Good-Nite* explicitly rejected the use of the *Master Slack* analysis in employer assistance cases.[62] And by agreeing that proof of employer support created a presumption – although rebuttable – of taint, Member Hayes, in *SFO Good-Nite*,[63] and, later Member Miscimarra,[64] implicitly rejected the *Master Slack* analysis in employer support cases.

SFO Good-Nite distinguished between "unfair labor practices directly related to an employee decertification effort," to which *Master Slack* does not apply, and "*other* unfair labor practices distinct from any unlawful assistance by the employer in the

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[58] 357 NLRB at 80 and 82.

[59] *Id.*, 81-83.

[60] 271 NLRB 78, 84 (1984). *Master Slack* provides several criteria to determine whether employer unfair labor practices, other than those involving employer support of decertification efforts, cause employee disaffection manifested by signatures on an anti-union petition. See *SFO Good-Nite Inn*, 357 NLRB at 79-80. The criteria are: "(1) the length of time between the unfair labor practices and the … filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union." *Overnite Transportation Co.*, 333 NLRB 1392, 1393 (2001).

[61] 342 NLRB 434 (2004).

[62] *Id.,* 79-80.

[63] *Id.*, 83

[64] *The Sheraton Anchorage*, 362 NLRB No. 123 (2015), slip op. at 6-7 (Member Miscimarra, dissenting).

actual decertification petition."[65] In these "other" cases, unlike employer support cases, "there is no straight line between the employer's unfair labor practices and the decertification campaign, and the *Master Slack* test must be used to draw one, if it exists."[66] See also CHM §§ 11730.3(a), 11730.3(c), 11733.2(a)(1), 11733.2(a)(3), which also distinguish between employer support violations and "other" violations that might taint petitions.

The instant case does not present an appropriate opportunity for the Board to decide whether the analysis established by the *SFO Good-Nite* majority, the analysis advocated by Member Hayes, the *Master Slack* analysis, or even some other analysis, ought to be used to determine causation in employer support cases. First, the employer support allegations here are so extensive that under any conceivable standard they would have tainted the signatures. Second, neither Lemon nor Mohawk have argued, in any more than a conclusory fashion, that the employer support allegations, if proven, would have left the petition untainted. And it is unlikely that they made any better arguments to the Director. So without facts that are worthy of extended analysis, or arguments proffering such an analysis, the Board should wait for a more appropriate case if it wants to reconsider the significant policy enunciated by *SFO Good-Nite*. If nonetheless the Board decides to announce here a different analysis, Southern Region requests that the matter be

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[65] 357 NLRB at 79-80, quoting *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654, 664-665 (4th Cir. 2009), petition for cert. dismissed, 131 S. Ct. 59 (2010) (emphasis in original).
[66] 357 NLRB at 80.

remanded to the Director with instructions to reevaluate causation on the basis of an administrative investigation, without a hearing.

B. The determination of causation on the basis of an administrative investigation rather than on a hearing, (1) is consistent with §9(c)'s structure and (2) protects from disclosure decertification supporters' identities

Under *SFO Good-Nite*, no causation hearing is necessary. Causation is conclusively presumed, so there is nothing to litigate at a hearing. But no hearing should be held even if the Board were to adopt Member Hayes' position that unlawful employer support created a presumption that could be rebutted by evidence that the signatory employees were "unaffected by, or possibly even unaware of, unlawful employer involvement…."[67] Such a hearing would inconsistent with §9(c)'s structure in which unlawful employer assistance is addressed in the regional director's preliminary investigation of a petition. A hearing would also be inconsistent with the §7 policy of guarding the identities of employees who signed a petitioner's showing of interest.

1. Notwithstanding *St. Gobain*, in employer assistance cases the regional director should determine causation as part of the director's initial investigation under §9(c).

First, as argued earlier, §9(c)(1)(A) indicates that the regional director should evaluate employer assistance violations as part of an administrative investigation to determine significant employee support and whether the employer indirectly filed

[67] 357 NLRB at 83.

the petition.[68] *St. Gobain Abrasives*[69] is not to the contrary. *St. Gobain* does not apply to employer assistance violations, only to "other" employer violations. Compare CHM §11730.3(c), covering "other" violations and recognizing that in *St. Gobain* "the Board concluded that a hearing should be held to resolve genuine factual issues as to whether there was a causal nexus between alleged unfair labor practices and the filing of a decertification petition before the dismissal of such a petition," with CHM §11730.3(a), covering employer support violations, which has no such provision.

St. Gobain's inapplicability is supported by the distinction drawn by *SFO Good-Nite* between employer support violations and "other" violations – that the former have a more direct impact on the gathering of the showing of interest to support the petition. That distinction also implicates differing treatment under §9(c). When a decertification petition is filed, employer assistance violations, having a direct impact on the interest showing, should be addressed as part of the initial administrative investigation.[70] "Other" violations, having a less direct impact on the interest showing, are more amenable to a *St. Gobain* hearing before dismissal.

2. A *St. Gobain* causation hearing would compromise the identities of the employees who signed to support the petition.

St. Gobain hearings would also be inappropriate in employer support cases because they would compromise the policy protecting the secrecy of the showing of

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[68] Above, section IV.

[69] 342 NLRB 434 (2004).

[70] See *Canter's Fairfax Restaurant*, 309 NLRB at 884, discussed above in section IV.A.5.

interest. If the parties could litigate whether signatory employees were "unaffected by, or possibly even unaware of, unlawful employer involvement,"[71] the disclosure of the signatories' identities would be necessary.

But the Board has always considered this information confidential, and appeals courts have agreed. In *NLRB v. J. I. Case Co.*, the employer demanded that, during a pre-election hearing, evidence be produced demonstrating that "the petitioning union represent[ed] a substantial number of … [unit] employees."[72] The court refused, stating that "a hearing … would bring about disclosure of the individual employees' desires with respect to representation and would violate the Board's long-established policy of secrecy of the employees' choice in such matters."[73]

And secrecy is necessary to protect employees' §7 rights. The Board's "refusal to permit litigation of it [the interest showing's adequacy] by the parties … [is] grounded on the imperative of avoiding the harmful effect that disclosure of information contained therein could inflict on the employees' exercise of their Section 7 rights."[74]

This policy is not at issue in litigating whether violations "other" than employer assistance caused employee disaffection and thereby tainted a petition. In *St. Gobain* itself, where the employer was accused of unilaterally implementing a health insurance program, the *Master Slack* inquiry would examine "how many

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[71] 357 NLRB at 83 (Member Hayes, dissenting).
[72] 201 F.2d 597, 598 (9th Cir.1953).
[73] *Id.,* 600.
[74] *G.R.D.G.*,323 NLRB 258, 259 (1997).

employees incurred an increase in the cost of health care; how much was the increase; how many employees enrolled in different plans as a result of the alleged unilateral change; how many employees switched care givers as a result of the change; and how many employees expressed dissatisfaction with the Union prior to the change."[75] Exploration of these issues would likely not expose the signatories' identities.

VII. Miscellaneous Arguments

Mohawk raises a number of additional arguments. Responsive arguments follow.

A. The elimination of delay is a priority that is balanced against other priorities – and that the 2014 election rules addressed.

Mohawk argues that the Board, especially in the context of the 2014 election rules, has emphasized the importance of speedy elections – except regarding the Policy.[76] But in promulgating the election rules, the Board responded to a similar criticism from the dissent: "[N]ot only is delay *not* our only concern, but it is not even a primary concern for many of the amendments; indeed, for certain changes, it is not a consideration at all."[77] In fact, the Board has always balanced competing priorities, of which speedy elections was only one. One competing priority is to protect employees' §7 rights, a priority that is not advanced by conducting elections tainted by unfair labor practices. "It advances no policy of the Act for the agency to

[75] 342 NLRB at 434.

[76] Mohawk's Request, e.g. p.1-2.

[77] 79 Fed Reg. at 74429 [emphasis the Board's].

conduct an election unless employees can vote without unlawful interference."[78] Moreover, in the 2014 election rules, the Board promulgated a new requirement in §103.20 that parties requesting that charges block an election must make an offer of proof so as to reduce delay caused by frivolous blocking requests. See, *Associated Builders and Contractors of Texas, Inc. v. NLRB*, in which the court responded to a similar attack on the Policy, stating that, in promulgating the 2014 rules, "the Board directly considered the delays caused by blocking charges, and modified current policy in accordance with those considerations."[79]

B. The §8(b)(1)(a) allegations against Southern Region have no impact on the dismissal of the instant RD petition

Petitioner complains that the Policy fails to take into account for the §8(b)(1)(a) allegations against the Union. This argument is a red herring because there is no comparison between the minor allegations of wrongdoing by Local Union officials compared to the egregious evidence of widespread unlawful decertification support by Mohawk supervisors.

Region 10 found merit to two allegations against Southern Region. In one instance, a Mohawk employee and local union committee member allegedly stated to a couple of co-workers that those circulating the petition would be fired. The statement by the committee member was not intended as a threat or coercion, but simply reflected his belief at the time that serial violations of two plant rules regarding employees being out of their designated work areas would inevitably

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[78] *Id.*

[79] 826 F.3d 215, 228 (5th Cir. 2016).

result in discipline. He did not make the statement to an RD petition circulator, and the statement cannot reasonably be construed as a threat.

The second allegation stemmed from a 2nd step grievance meeting for a grievance filed by the Union contending that Mohawk gave the Petitioner free rein to travel throughout the plant on work time to collect petition signatures in violation of Mohawk's work rules. During the grievance meeting, the local union mill chair made a remark interpreted by management as asking the Company to fire Lemon. The intent of the request (as clearly presented on the written grievance form) was to end the disparate enforcement of the plant rules prohibiting being out of work area. The mill chair never threatened Lemon and Lemon was not even present at the grievance meeting where the allegedly unlawful statement was made, In fact, the meeting occurred in early November, 2017, after the RD petition had been filed.

To avoid incurring further legal expenses, and to save the Union's resources, Southern Region executed an informal settlement agreement containing a non-admissions clause related to the above-allegations. The Region's merit determination on the allegations against the Union, and the Union's execution of the settlement agreement, have no legal effect on the propriety of the Director's dismissal of the RD petition. The allegations against the Union pale in comparison to the rampant violations by the Company that clearly taint the showing of interest in this case. Therefore this is not an instance where the Union's conduct should result in any mitigation of the remedy for Mohawk's pervasive unlawful support.

In fact, the Union has failed to locate any examples where the dismissal of a decertification petition was overturned due to union violations. Southern Region therefore submits that there is no basis in Board law for the Union's conduct to be used as a basis to alter the Director's dismissal of the RD petition. The Union's and Mohawk's conduct must be viewed independently, and thus if the Company's violations warrant dismissal of the RD petition, that decision stands on its own irrespective of the Union's conduct.

The closest case that deals with withholding relief due to a union's violations is *Laura Modes*,[80] where the Board found that the company violated the Act's §8(a)(5) by refusing to recognize the union. The Board, however, declined "to give [the union] the benefit of our normal affirmative bargaining order" because the union "evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant."[81]

However, the Board has made clear that *Laura Modes* relief is not routine. Indeed, the Board has characterized the withholding of an otherwise appropriate remedial bargaining order as an "extraordinary sanction." *New Fairview Convalescent Home.*[82]

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[80] 144 NLRB 1592 (1963).

[81] *Id.* at 1596.

[82] 206 NLRB 688, 689 (1973), *enfd.* 520 F.2d 1316 (2d Cir. 1975), *cert. denied* 423 U.S. 1053 (1976).

Therefore, here, even if *Laura Modes*-type relief were available in this situation (i.e. a remedy less than full dismissal of the RD petition), it would not be appropriate under the present facts because the two allegations against the Union to which the Region has found merit – even assuming they are true – do not rise to the level of extreme conduct that warrants an "extraordinary sanction." There were no threats made directly to Lemon or petition signers; instead the statements were merely isolated off-the-cuff remarks.

By contrast, where *Laura Modes* relief has been granted, the violations by the union were extremely egregious and involved violence. For example, in *Laura Modes*, the employer had unlawfully refused to recognize and bargain with a union that held authorization cards. The Board refused to issue a bargaining order because, immediately before and after the union filed its charges, it engaged in unprovoked and irresponsible physical assaults on the employer.[83] In *Aircraft Mantel & Fireplace Co.*[84] the union obtained signed authorization cards from a majority of the workers and an 8(a)(5) violation was found against the employer for its refusal to extend recognition. However, the Board withheld redress of this 8(a)(5) violation because of numerous acts of violence and misconduct on the picket line, including vandalism to respondent's premises, the placement of nails under vehicles entering said premises, mass picketing, threats, of bodily harm, the paint bombing

[83] 144 NLRB at 1595-96.

[84] 174 NLRB 737 (1969).

of the homes of nonstrikers, and the throwing of a cup of coffee by a nonemployee union representative into the face of the employer's owner.

Thus, *Laura Modes relief* is typically ordered in only the most serious cases where a union has engaged in violence. In fact, the Board has held that, "The absence of violence is an acceptable reason for not applying *Laura Modes*." *St. John's Hosp*.[85] Here, there is no allegation of violence by Southern Region. The alleged Union violations, even if presumed true, fall well short of the level of misconduct found in cases where *Laura Modes* relief was ordered. For this reason, the Director's dismissal of the RD petition should be upheld without modification.

CONCLUSION

Mohawk asserts a great concern for the employees' statutory rights. But the Supreme Court counseled:

> The Board is … entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.[86]

Mohawk's proposed "remedy" of vote and impound would further undermine these rights. §7 and §9(c) protect the employees' right to be represented by their union, and protect this right from jeopardization through an unlawfully procured election. The blocking charge policy is a vehicle through which these rights are protected. The Policy should be maintained.

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[85] 281 NLRB 1163, 1174-75 (1986).

[86] *Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996).

Respectfully submitted,

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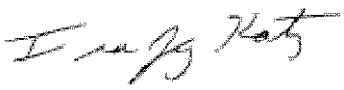

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Dated: June 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I submitted the foregoing **UNION'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DISMISSAL OF PETITION** to the National Labor Relations Board by electronic filing and e-mailed a copy of the same to the Regional Director for NLRB Region 10 and counsel for Mohawk and the Petitioner:

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